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**IN THE  
Supreme Court of the United States  
OCTOBER TERM, 1986**

**HARRISON J. GOLDIN, Comptroller of the  
City of New York, and THE CITY OF NEW  
YORK,**

*Petitioners,*

*-against-*

**JAMES BAKER, Secretary of the Treasury,  
of the United States,**

*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals  
for the Second Circuit**

**BRIEF AMICUS CURIAE OF THE NATIONAL  
INSTITUTE OF MUNICIPAL LAW OFFICERS AND  
THE POLITICAL SUBDIVISIONS OF STATES  
REPRESENTED BY THE AUTHORIZED LAW  
OFFICERS THEREOF IN SUPPORT OF PETITION  
FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE SECOND  
CIRCUIT FILED BY THE CITY OF NEW YORK**

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS.....	(i)
TABLE OF AUTHORITIES.....	(ii)
INTEREST OF AMICUS CURIAE.....	1
STATEMENT OF THE CASE.....	4
SUMMARY OF ARGUMENT.....	4
ARGUMENT .....	4
FEDERALISM EMBODIED IN THE CONSTITUTION AND CASE LAW ALL SUPPORT THE CONTENTION THAT THE FEDERAL GOVERNMENT IS UNLAW- FULLY IMPOSING A TAX ON MUNICIPAL BOND INTEREST	
CONCLUSION.....	7

## TABLE OF AUTHORITIES

Cases:	Page
<i>Brushaber v. Union Pacific R. Co.</i> , 240 U.S. 1 (1916) .....	7
<i>Massachusetts v. United States</i> , 435 U.S. 444 (1978) .....	5
<i>Metcalf &amp; Eddy v. Mitchell</i> , 269 U.S. 514 (1926) .....	5
<i>Peck &amp; Co. v. Lowe</i> , 247 U.S. 165 (1918) .....	7
<i>Pollock v. Farmers' Loan &amp; Trust Co.</i> , 157 U.S. 429, <i>opinion on rehearing</i> , 158 U.S. 601 (1895) .....	5, 7
<i>Stanton v. Baltic Mining Co.</i> , 240 U.S. 103 (1916) .....	7
<i>Willcuts v. Bunn</i> , 282 U.S. 216 (1931) .....	5, 7
Constitutional Provisions:	
Tenth Amendment .....	2
Sixteenth Amendment .....	6, 7
Statutes:	
26 U.S.C. § 86, Pub. Law 98-21 § 121,97 Stat. 65 (1983) .....	<i>passim</i>
Miscellaneous:	
45 CONG. REC. 1694 <i>et. seq.</i> (1910) .....	6
45 CONG. REC. 2245, 2247 (1910) .....	6

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**INTEREST OF THE AMICUS CURIAE**

This brief *Amicus Curiae* is filed pursuant to Rule 36 of the rules of this Court on behalf of the more than 1,900 local governments that are members of the National Institute of Municipal Law Officers (NIMLO) in support of the City of New York, a NIMLO member. NIMLO is a national organization comprised of municipalities and local government units who are political subdivisions of

states within the terms of Rule 36.4 of this Court as this brief is sponsored by the authorized law officers of those who have signed it.

Member local governments operate NIMLO through their chief legal officer variously called city or county attorney, corporation counsel, city solicitor, law director, and other titles. The accompanying brief is signed by the attorneys constituting the governing body of NIMLO, both on behalf of NIMLO and as the authorized law officer of each of their political subdivisions of a State, Territory or Commonwealth.

NIMLO's member municipalities have a vital interest in the resolution of the question presented in this case; namely whether the Federal government may impose a tax on the interest Social Security recipients receive on the now tax exempt municipal securities they own in violation of the United States Constitution's Tenth Amendment<sup>1</sup> and the doctrine of intergovernmental tax immunity embodied in Federalism.

Section 86 of the Internal Revenue Code 26 U.S.C. § 86, Pub. Law 98-21 § 121, 97 Stat. 65 (1983)<sup>2</sup> adopted in 1983 imposes Federal income taxes on income received by certain owners of municipal bonds who receive Social Security benefits. The formula used for imposing the tax under Section 86, imposes the tax upon any person who both owns municipal bonds and is a Social Security beneficiary. A few exceptions are provided based upon amount of income. This is a national issue, not just one affecting New York City. Section 86 imposes Federal income

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<sup>1</sup> See Petitioners' Petition page 4 for text.

<sup>2</sup> *Ibid.* Pages 5-6 for text.

tax upon the group of municipal bond purchasers most likely to buy municipal tax exempt bonds, i.e., those earning over \$25,000.

The tax is stated to be a tax upon Social Security benefits but the tax in many cases applies when a Social Security beneficiary receives income from tax exempt bonds. Hence, while the tax is in words a tax on Social Security benefits it is actually a tax upon tax exempt securities income.

Such a tax, if not found unlawful, will severely increase the interest cost all cities must pay therefore curtailing the municipality's ability to borrow money needed to fund essential services and capital projects. Should this Federal tax continue to remain on local government securities, additional funds will have to be appropriated to maintain the current level of financial support provided by now tax exempt municipal bond purchasers. Additional municipal appropriations will be needed to cover the increase in interest a municipality would have to pay on its securities; an increase necessary to overcome the adverse effect of the Federal government's unlawful tax.

Such a tax is a serious breach in the agreement the Constitution provides to reciprocally respect the sovereignty of the Federal government and the States and their political subdivisions. The agreement that the Federal government could not tax interest from state and municipal bonds has been upheld by this Court for nearly 100 years. For the Federal government to extend its considerable power of taxation beyond that delegated by the Constitution at the expense of state and local governments is an egregious violation of the principles of Federalism. Such action is not in the public interest and severely hampers New York City and other municipal members of NIMLO from exer-



cising their constitutionally protected rights. Consequently, NIMLO members urge this Court to grant New York City the Writ of Certiorari it seeks and reverse the judgment rendered in this case by the United States Court of Appeals for the Second Circuit.

## STATEMENT OF THE CASE

The statement of the case as set forth in Petitioner's Petition for Writ of Certiorari is adopted by Amici for purposes of this brief *amicus curiae*.

## SUMMARY OF ARGUMENT

The Second Circuit did not abide by the decisions of this Court in finding no constitutional violations by the Federal income tax imposed by Internal Revenue Code Section 86 on income earned by municipal securities. Such a ruling contravenes decisions of this Court dating back to 1895 which hold such a tax violates the doctrines of reciprocal tax immunity and Federalism. Petitioners' Writ of Certiorari should be granted and the Second Circuit's decision should be reversed to remove the burden thereby placed on municipalities' attempts to raise funds for essential public services through the issuance of municipal securities.

## ARGUMENT

### **Federalism Embodied in the Constitution and Case Law All Support the Contention that the Federal Government is Unlawfully Imposing Tax on Municipal Bond Interest**

When drafting the Constitution nearly 200 years ago, the Founding Fathers were quite cognizant of the need to keep the National Government, thereby created, from violating the sovereignty of the States and their political sub-



divisions. This wariness of a central Federal Government operating at the expense of the States is reflected throughout the Constitution and the debates during its drafting and ratification. Such respect for the sovereignty of state and local government is the overriding concern in the development of Federalism in American law.

Nearly 100 years ago this Court recognized the constitutional barriers preventing the Federal Government from violating the concepts of Federalism by seeking to collect revenue from the States. In *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, *opinion on rehearing*, 158 U.S. 601 (1895) this Court held that state and local bond interest is constitutionally immune from federal income taxation. In *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 522 (1926) it was stated that income derived from the ownership of municipal bonds was so intimately connected to the sovereign borrowing power that such interest income was likewise constitutionally immune from federal taxation. This immunity doctrine as described in these cases and their progeny have survived to this day, providing necessary protection for the delicate balance of power between the States and the Federal Government. See *Massachusetts v. United States*, 435 U.S. 444 (1978).

Before the Court in this case is a threat to that balance of power between sovereigns. Petitioner, a political subdivision of a State, is challenging a Federal law which violates the constitutional barriers erected to protect the system of Federalism in this Country. That law, 26 U.S.C. § 86, states that otherwise tax-exempt interest earned on municipal securities is to be treated as income in determining whether Social Security benefits are to be taxed. This law is in direct conflict with this Court's decisions in *Pollock, supra*, *Willcuts v. Bunn*, 282 U.S. 216 (1931) and *Massachusetts, supra*. The Court of Appeals for the Second Circuit was incorrect in determining that Section 86

is constitutional since it taxes Social Security income rather than imposing the tax on municipal securities. The Court erred in failing to recognize in many cases additional tax an individual would have to pay under Section 86 is entirely due to the existence of income from municipal securities. The greater such income, the greater the tax burden and this type of tax is what this Court has previously found unconstitutional. By failing to follow this Court's decisions, the Second Circuit has significantly contributed to the erosion of municipal borrowing authority. The Circuit's decision will force municipal bond issuers to raise interest rates to retain their current level of competitiveness in the bond market. This added expenditure municipalities will have to provide will impair their ability to raise revenue and fund essential public services.

The Sixteenth Amendment<sup>3</sup> to the Constitution does not provide power to the Federal Government to tax municipal interest income. The history of the Amendment reflects the intent of its sponsors to prohibit the Federal Government from imposing costs which are in effect a tax on the interest of state and local government bonds. There was never any suggestion made in Congress that the Sixteenth Amendment involved the taxation of municipal bond interest. In fact, when the Amendment was before the States, several members of Congress assured state officials that its language would not lend itself to such an interpretation.<sup>2</sup>

This Court in 1916 held that the Amendment added no new subject to the taxing power of Congress, but merely

<sup>3</sup> "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration." (adopted 1913).

<sup>4</sup> See Statements of Senator Borah, 45 CONG. REC. 1694 *et. seq.* (1910); Senator Brown, 45 CONG. REC. 2245, 2247 (1910).

eliminated the apportionment requirement of *Pollock*. *Brushaber v. Union Pacific R. Co.*, 240 U.S. 1, 11 (1916); *Stanton v. Baltic Mining Co.*, 240 U.S. 103, 112 (1916). The Court reached the same conclusion in *Peck & Co. v. Lowe*, 247 U.S. 165, 172 (1918) and *Willcuts*, *supra*. To the extent it found the Sixteenth Amendment supports the Section 86 provision of the Internal Revenue Code the Second Circuit has erred. The Second Circuit rejection of this Court's reasoning in *Pollock*, *supra*, and its progeny and its misconstruance of the effects of the Sixteenth Amendment will put a severe impairment on local governments' ability to raise needed revenue. The Petitioner, City of New York, raises a serious constitutional question which was answered incorrectly by the Second Circuit's decision. Only this Court may rectify the situation and restore order to the municipal bond market by granting the Petition for a Writ of Certiorari herein and reversing the Second Circuit's erroneous decision.

## CONCLUSION

For the foregoing reasons, Amicus respectfully urges that Petitioners' Petition for Writ of Certiorari be granted.

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

Jan Majewski, attorney for amicus, certifies that on May 12, 1987, he caused three copies of the foregoing brief to be delivered to Peter L. Zimroth, Corporation Counsel of the City of New York; Leonard J. Koerner, Assistant Corporation Counsel; Fay Leoussis, Assistant Corporation Counsel; and Barry P. Schwartz, Assistant Corporation Counsel, Attorneys for Petitioners, New York City Law Department, 100 Church Street, New York, NY 10007. Three copies of the foregoing brief were also delivered to Charles Fried, Solicitor General, U.S. Department of Justice, 10th and Constitution Ave., N.W., Washington, D.C. 20530, Attorney for Respondent on May 12, 1987.

The briefs were delivered by placing said briefs in the United States Postal Service mail addressed to each of said counsel with required postage affixed thereon.

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May 12, 1987



